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No. 86-409

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

METROPOLITAN TRANSPORTATION AUTHORITY and
METRO-NORTH COMMUTER RAILROAD COMPANY,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA and
NATIONAL RAILROAD PASSENGER CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR NATIONAL RAILROAD PASSENGER CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that an order by the Interstate Commerce Commission (ICC) requiring the continued exercise of trackage rights by one railroad over the line of another railroad does not constitute a "taking" of the latter's property under the Fifth Amendment.

2. Whether, assuming *arguendo* that a "taking" occurred, it is constitutional for the ICC, rather than an Article III court, to calculate compensation in the first instance, subject to judicial review by an Article III court; and whether, under the facts in this case, the compensation awarded is constitutionally adequate.

PARTIES

All of the parties are named in the caption above.*

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* National Railroad Passenger Corporation ("Amtrak") is a corporation chartered under the laws of the District of Columbia in accordance with section 301 of the Rail Passenger Service Act, 45 U.S.C. § 541. Amtrak is not a subsidiary of any other corporation. Amtrak owns 100% of the capital stock of the Chicago Union Station Company and of the Washington Terminal Company.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 792 F.2d 287. The memorandum opinions and orders of the ICC (Pet. App. 26a-33a, 34a-46a, 47a-73a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1986. The petition for a writ of certiorari was

filed September 2, 1986, and, after being corrected to comply with this Court's rules, was refiled September 16, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner Metropolitan Transportation Authority ("MTA") is an agency created by the State of New York to preserve, operate and improve mass transit, including commuter rail service, in the New York metropolitan area. In order to qualify for substantial federal aid for rehabilitation of rail commuter service, MTA acquired by purchase or lease various rail properties in the New York area which are operated by its railroad subsidiaries, including Metro-North Commuter Railroad Company ("Metro-North"), a co-petitioner.

Respondent National Railroad Passenger Corporation ("Amtrak") was created pursuant to the Rail Passenger Service Act ("RPSA") to provide intercity rail passenger service throughout the United States. 45 U.S.C. §§ 501 *et seq.*; *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 105 S.Ct. 1441, 1445-47 (1985). Because intercity rail passenger operations in this country have been unprofitable for many years, Amtrak's operating deficits—currently approximately $600 million per year—are funded by federal appropriations.

Ever since it commenced operations in 1971, Amtrak has provided intercity rail passenger service between Grand Central Station in New York City and Albany over the so-called Hudson line. Initially, these services were provided by agreement with Penn Central, the owner of the line, whereby Penn Central operated Amtrak's trains for Amtrak's account. In 1972, Penn Central leased to MTA the portion of the Hudson line between Grand Central and Poughkeepsie, reserving from the conveyance the trackage rights necessary to continue to operate its freight trains and Amtrak's passenger

trains. Contemporaneously, Penn Central also agreed to provide, as MTA's agent, rail commuter services over the leased line.

Consolidated Rail Corporation ("Conrail") supplanted Penn Central when, effective April 1, 1976, Penn Central's trustees conveyed to that federally-created railroad, the trackage rights for freight and intercity passenger operations that had been reserved under the MTA lease.[1] Conrail also took over Penn Central's operation of commuter service that had been provided under the MTA-Penn Central Service Agreement. The Amtrak-Penn Central Operating Agreement was replaced by a new Amtrak-Conrail Operating Agreement, effective April 1, 1976, that provided for the continued operation of intercity rail passenger trains over the Hudson line to Grand Central. From that date through December 31, 1982, all rail operations over the Hudson line were managed by Conrail, using Conrail train crews: freight service (for its own account), intercity passenger service (for Amtrak's account), and commuter service (for MTA's account).

In 1981, as part of an effort to return Conrail to the private sector, Congress adopted the Northeast Rail Service Act ("NRSA"), 95 Stat. 643. One of its purposes was to free Conrail from commuter service responsibilities by transferring them to other "entities whose principal purpose is the provision of commuter service." NRSA, § 1133(a), 45 U.S.C. § 1102(2). The statute expressly relieved Conrail of any legal obligation to operate commuter service effective January 1, 1983. 45

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[1] This conveyance was part of the federally-assisted restructuring of the Northeast rail industry contemplated by the Regional Rail Reorganization Act of 1973, the constitutionality of which was upheld by this Court in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). The federal government spent approximately $7 billion to acquire and rehabilitate the rail properties conveyed to Conrail, which was the principal vehicle for preserving essential rail freight service in New York and the rest of the northeastern United States.

U.S.C. § 744a. It also provided MTA and other commuter authorities with the option of contracting with a new envisoned entity, "Amtrak Commuter," for the provision of commuter services. 45 U.S.C. §§ 581-591. Neither MTA nor any other commuter authority chose to avail itself of this option, and Amtrak Commuter was stillborn. Instead, MTA organized its subsidiary Metro-North to manage the properties leased from Penn Central in 1972 and to operate commuter service to and from Grand Central.

The present proceeding results from the transfer of management of MTA's leased properties on the Hudson line from Conrail to MTA's own subsidiary, Metro-North, which occasioned the need for an additional agreement, effective on and after January 1, 1983, between Amtrak and the new manager, Metro-North. When negotiations for such an agreement stalemated, Amtrak initiated this proceeding before the ICC pursuant to Section 402(a) of RPSA, which empowers the ICC to order that Amtrak be provided use of tracks and facilities and to establish just and reasonable compensation. Petitioners reacted by seeking declaratory relief in the Special Court established by the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 1105 ("Special Court").[2]

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[2] Petitioners asked the Special Court to declare (a) that Amtrak had no trackage rights over the Hudson line except as those rights were created by Section 504(f) of RPSA, 45 U.S.C. § 584(f), (b) that the "creation" of such trackage rights was an act of eminent domain by the United States and (c) that Petitioners were entitled to just compensation under the Fifth Amendment. Petitioners' motion for summary judgment on these claims was denied by the Special Court on November 23, 1984. *Consolidated Rail Corp. v. Metro-North Commuter R.R.*, 598 F. Supp. 1571 (not appealed). In that opinion, Judge Friendly concluded that there was no Fifth Amendment taking. *Id.* at 1583. Thereafter, MTA amended its counterclaim against the United States, contending that Congress' cancellation of the commuter service contracts as part of the effort to return Conrail to the private sector constituted a Fifth Amendment taking. This claim was also rejected by the Special Court

In its application to the ICC, Amtrak proposed to reimburse Metro-North for the incremental or "avoidable" costs that Metro-North incurs by reason of Amtrak's operations on the Hudson line, *i.e.*, all the additional costs incurred by Metro-North as a result of Amtrak's operations over MTA's facilities. In addition, Amtrak proposed a system of "incentive payments" based on on-time performance of its trains on the Hudson line. This system was essentially the same compensation system as contained in the operating agreements with the various private freight railroads over which Amtrak operates and offered Metro-North the opportunity to earn up to $1.2 million per year above its incremental costs.

Both before the Special Court and the ICC, Petitioners unsuccessfully challenged the jurisdiction of the ICC to establish trackage charges, contending that the Fifth Amendment required that compensation be determined by an Article III court. The Special Court, per Judge Friendly, refused to enjoin the ICC proceeding, finding that the claim of unconstitutionality was "not substantial" in light of *Thompson v. Texas Mexican Ry.*, 328 U.S. 134, 147-148 (1946). (Pet. App. 137a-141a)

The ICC initially sustained its jurisdiction under Section 402(a) of the RPSA and denied the motion to dismiss in a decision entered July 27, 1984. (Pet. App. 26a-33a) After the submission of evidence by both sides, Petitioners renewed their challenge to the ICC's jurisdiction, again contending that Section 402(a) of RPSA violated the Fifth Amendment. The ICC, by order entered Ocotber 25, 1984, rejected these arguments, finding that no "taking" had occurred because Metro-North retained the right to use its property and moreover that even where a taking does occur, it was constitutional for Congress to delegate to an agency the task of determining

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in the final disposition of that case. *Consolidated Rail Corp. v. Metro-North Commuter R.R.*, 638 F. Supp. 350 (1986) (not appealed).

compensation, subject to judicial review. (Pet. App. 40a-41a)

The ICC's final decision, dated July 5, 1985, adopted the costing principles and incentive payment program proposed by Amtrak. (Pet. App. 47a-70a) The ICC directed the Petitioners to "continue to make available to Amtrak (a) the space and facilities now used by Amtrak at Grand Central Station, Croton-Harmon Station, and Poughkeepsie Station, and (b) all trackage and related facilities between Grand Central Station and Milepost 75.8 on the Hudson line." The order further directed Metro-North to "continue to provide" certain specified ancillary services. In return, Amtrak was directed to pay all incremental costs incurred by Metro-North (estimated by the parties at approximately $800,000 per year) plus the incentive or performance payments for on-time service (estimated at up to $1.2 million per year).[3] The ICC concluded that its award of incremental costs would "place Metro in a no better or no worse position than if Amtrak did not make use of Metro's facilities" and that the bonus potential would give "Metro an incentive to improve its service." (Pet. App. 50a-51a, 66a-73a)

The Court of Appeals for the Second Circuit affirmed the Commission's decision. (Pet. App. 1a-25a) Finding first that the ICC properly exercised its jurisdiction under Section 402(a) of RPSA, the court then turned to Petitioners' claims that Section 402(a) was unconstitutional. It rejected Petitioners' argument that the Constitution required adjudication of just compensation for trackage rights charges by an Article III court. Agreeing with Judge Friendly's conclusion in the related Spe-

[3] By agreement of the parties, the ICC's compensation award (other than incentive payments) was made retroactive to January 1, 1983. (Pet. App. 68a) Moreover, the estimated amounts assumed by the ICC have been adjusted and are likely to continue to be adjusted by agreement of the parties in connection with working out the details of daily railroad operations.

cial Court case, Judge Oakes concluded that the issue was governed by this Court's decision in *Thompson v. Texas Mexican Ry.*, 328 U.S. 134 (1946), and that "*Thompson* unquestionably stands for the proposition that the delegation of power to the ICC to set trackage rates, subject to ultimate judicial review, is constitutional." (Pet. App. 17a-19a)

The court then rejected Petitioners' claims that Section 402(a) of RPSA was unconstitutional in basing awards on avoidable costs. First, it agreed with the ICC that a Section 402(a) proceeding does not involve a "taking" within the meaning of the Fifth Amendment but rather was regulation of a nature consistently upheld by this Court in cases spanning a century. The court went further, however, and held that, assuming *arguendo* that there was a Fifth Amendment "taking," the ICC's award met Fifth Amendment standards since "MTA, in obtaining avoidable costs, will receive what it would have had but for the taking." (Pet. App. 19a-20a)

ARGUMENT

The court of appeals correctly affirmed the ICC's decision and correctly held that Section 402(a) of RPSA is constitutional. The court's holding does not conflict with any decisions of this Court and is consistent with the decisions of other courts of appeals. The case does not warrant this Court's review.

1. An ICC Order Under Section 402(a) Is Not A Taking.

Petitioners' threshold argument that Amtrak's continued exercise of trackage rights over MTA's Hudson line constitutes a "taking" of the latter's property is contradicted by the undisputed facts of this case, the decisions below, the related decision by Judge Friendly in the Special Court and over 90 years of federal decisions.

The ICC's order took nothing from Petitioners. It simply required them to "continue to make available to

Amtrak" rail facilities which Amtrak had been using under agreements with Metro-North's predecessors. (Pet. App. 68a)

For well over a century, Congress and the various states, acting within their regulatory powers, have required railroads to allow other railroads to use their tracks and related facilities under trackage rights arrangements. This Court's decision in *Union Pacific Ry. v. Chicago, R.I. & P. Ry.*, 163 U.S. 564 (1896), put to rest any contention that such trackage rights arrangements "took" any property of the owning railroad. There the Court noted that the trackage rights user "had no possession before its trains came on the tracks, or after they had run off of them; and while its trains were on the tracks, its possession was only of the particular part occupied temporarily while running over them." *Id.* at 582. Noting that "in England and in this country, railroads, when first constructed, were by the legislatures and the people regarded and treated as public highways for the use of all who had occasion to run their vehicles thereon" (*id.* at 585), the Court went on to conclude that under the trackage rights arrangement before it, the Union Pacific had not been deprived of any part of its public franchise or its private property. *Id.* at 589.

The decision of this Court in 1896 in *Union Pacific* has been followed consistently by this Court, the Special Court, and courts of appeal.[4] Petitioners have advanced

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[4] Thus, following *Union Pacific*, in *Thompson v. Texas Mexican Ry.*, 328 U.S. 134 at 140, this Court noted that the trackage rights agreement created only a "personal obligation and did not purport to grant Brownsville [the user] any estate in the property of Tex-Mex [the owner]."

The rule that trackage rights do not "take" any part of the owner's property has been consistently followed by the courts that have passed on the issue. Thus, the Special Court as recently as 1984 determined under the same facts as were presented in this case that there was no "taking" of Petitioners' property. *Consolidated*

no cogent reasons why this 90-year-old line of precedent should be abandoned. Instead, they ignore it.[5]

Railways, like public roads, the navigable waters and the airways, are public highways. *E.g., Union Pacific, supra,* 585; *Wisconsin, M. & P. R.R. v. Jacobson,* 179 U.S 287, 296-97 (1900). If the use of such public highways by trains, motor vehicles, vessels and aircraft constitute "takings" under the Fifth Amendment, then there are literally millions of takings occurring each day in the United States. We seriously doubt whether this Court would wish to entertain this view. Even in *United States v. Causby,* 328 U.S. 256 (1946), where aircraft flew far below the public airspace, the Court held there could be a taking only if they were "so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." *Id.,* 266. Petitioners, however, make no claim that Amtrak's trains in any way interfere with their own operations.

Rail Corp. v. Metro-North Commuter R.R., 598 F. Supp. 1582-83. Metro-North took no appeal after this decision became final. *Accord, In re New York, Susquehcnna & Western R.R.,* 160 F.2d 29, 31 (3d Cir. 1946), *cert. denied,* 331 U.S. 844 (1947); *Louisville & Nashville R.R. v. M/V Bayou Lacombe,* 597 F.2d 469, 471 (5th Cir. 1979); *Gibbons v. United States,* 660 F.2d 225, 229 (7th Cir. 1981); *Gibbons v. United States,* 660 F.2d 1227, 1238-39 (7th Cir. 1981); *Chicago, M. St.P. & P.R.R. v. Chicago, R.I. & P. Ry.,* 138 F.2d 268, 270 (8th Cir. 1943), *cert. denied,* 320 U.S. 804 (1944).

[5] Petitioners divert attention from the controlling precedent by making an unsound analogy to 49 U.S.C. § 11125, which authorizes the ICC to direct one railroad involuntarily to take over traffic and employees as well as possession of the lines of another railroad for up to 240 days under certain conditions when the other "cannot transport the traffic offered to it." That section does not apply here because Amtrak is not taking over traffic, employees, and possession. But even in that type of situation, which analytically is much closer to "taking" since it involves a complete physical occupation of the property of the other railroad, there is no "taking" present. *Lehigh & New England Ry. v. ICC,* 540 F.2d 71, 81-82 (3d Cir. 1976), *cert. denied,* 429 U.S. 1061 (1977) (cited by Petitioners). Petitioners cite no decision to the contrary.

2. It Was Not Unconstitutional For The ICC To Determine Compensation In The First Instance.

Even assuming *arguendo* that the ICC's order constituted a Fifth Amendment taking, none of the cases cited by Petitioners supports their contention that an Article III court, rather than the ICC, must determine compensation in the first instance. The Fifth Amendment simply states that "private property [shall not] be taken for public use without just compensation." It contains no limitation on the means by which the amount of compensation due may be ascertained, and this Court has long recognized the propriety of permitting non-judicial bodies to participate in the process.

Moreover, the decisions Petitioners cite merely establish that an Article III court must *ultimately* determine whether the regulatory action is within constitutional and statutory bounds. Railroad regulation is a legislative, not a judicial, act. Initially, Congress left most such regulation to the states, which exercised their authority over trackage rights arrangements through state railroad commissions. Congress also acted directly and by the dawn of the twentieth century had enacted over 350 acts requiring the grant of trackage rights. *Union Pacific R.R. v. Mason City & F.D. R.R.*, 199 U.S. 160, 167 (1905). This conflicting patchwork of regulation led to the Transportation Act of 1920 in which Congress centralized all regulation of trackage rights with the Interstate Commerce Commission, giving it exclusive jurisdiction to regulate trackage rights arrangements. The Court approved this action in *Transit Commission v. United States*, 289 U.S. 121 (1933).[6]

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[6] Ironically, *Transit Commission* involved the Long Island Railroad, which is now a subsidiary of Petitioner MTA, and Penn Station, which is now owned by Respondent Amtrak. The Court held that the ICC, rather than New York's regulatory commission, had jurisdiction to set rates for the Long Island's trackage rights into Penn Station. Fifty years later, neither MTA nor the Long Island came forward to question the ICC's jurisdiction to prescribe

Thereafter, in *Thompson v. Texas Mexican Ry., supra*, this Court went further and held that the ICC's jurisdiction preempted even the federal courts:

> "[I]t is more consistent with this scheme of regulation for the Commission rather than courts or juries to determine the amount of the rental. Any legal, including constitutional, rights of Tex-Mex are protected by the review which Congress has granted the orders of the Commission." 328 U.S. at 150.[7]

The soundness of this Court's holding in *Thompson* has never been questioned. It was followed by the court below as it has been in other circuits. *E.g., Chicago & N.W. Ry. v. Chicago, M. St. P. & P. R.R.*, 502 F.2d 193 (7th Cir. 1974). Petitioners cite no arguably conflicting authority arising under railroad regulation.[8]

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compensation terms for trackage rights for commuter trains operating on Amtrak's rail lines. *Costing Methodologies for the Northeast Corridor: Commuter Service*, 367 I.C.C. 192 (1983).

[7] All the reasons that supported the Court's conclusion in *Thompson* apply with equal force to Section 402(a). Determinations under that section require specialized expertise and the effectiveness of the statute depends upon its uniform and predictable administration.

[8] Petitioners do not argue that *FCC v. Florida Power Co.*, No. 85-1658 (argument scheduled, Dec. 3, 1986), is in any way applicable to the instant case. The issues in *Florida Power* are in fact different from the question presented here. This case does not involve a cognizable taking or (in view of a century of railroad regulation) the frustration of any reasonable expectation interest. See pp. 7-9, *supra*, and Pet. App. 20a. The decision on appeal in *Florida Power*, in which appeal no one has called into question this Court's decision in *Thompson*, will have no impact upon this petition for certiorari unless this Court is disposed to call into question *Thompson* and the entire line of precedent associated with it. Petitioners allege that if *Thompson* is applicable, then it is in conflict with the statement in *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893), that "the ascertainment of [just compensation] is a judicial injury," and that "certiorari should be granted to settle that conflict" (Pet. 15-16). That contention will not stand scrutiny, as there is no conflict between the

3. The Compensation Awarded In This Case Is Constitutionally Adequate.

Petitioners' argument that the rate-making standard of Section 402(a) of the RPSA as applied by the ICC is "unfair" and hence contrary to the Fifth Amendment (Pet. App. 16-27) is noticeably silent in demonstrating any conflict between the decision below and decisions of other circuits or the decisions of this Court.[9]

Judge Oakes, in his opinion below, aptly disposed of Petitioners' contentions when he said:

> The second reason that Metro's argument here fails is that, assuming arguendo that there has been a taking, compensation is adequate since MTA, in obtaining avoidable costs, will receive what it would have had but for the taking. *Cf. Chicago & North Western Transportation Co. v. United States*, 678 F.2d 665, 668 (7th Cir. 1982). In other words, the owner, here the lessee, of the railroad facilities will

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general statement in *Monongahela* and the principle expressed in *Thompson* that in matters involving regulation which has been delegated to a regulatory agency, the agency may determine compensation in the first instance, subject to review by the courts to make sure that constitutional rights have been protected.

[9] Petitioners' general lament, throughout their petition, that they have been treated "unfairly" by the Congress, the ICC and the federal courts is further belied by the fact, shown on the record below, that between 1965 and September 30, 1983, the U.S. Urban Mass Transit Administration ("UMTA") made capital grants of over $1.6 billion to the New York metropolitan region's commuter railroads. Most of such grants went to MTA's rail subsidiaries, Metro-North and the Long Island Railroad. The federal government provided another $59 million to Metro-North for transition costs when it commenced commuter rail operations in 1983. UMTA operating subsidiaries to MTA in 1984 were $24.4 million. These grants were in addition to the other federal programs designed to preserve essential rail transportation service in the New York area, programs such as Conrail (see note 1, *supra*) and even Amtrak itself.

> be put into the same position monetarily as it would have occupied if the property had not been taken, and this is precisely the guiding principle of what is just compensation. *United States v. Reynolds*, 397 U.S. 14, 16 (1970); *United States v. Virginia Electric & Power Co.*, 365 U.S. 624, 633 (1961). Perhaps the whole taking argument can be dismissed with the comment that MTA and Metro-North really wish to seek to have Amtrak share with them the overhead costs of 'ownership.' If the Fifth Amendment required such a sharing, they would be put in a better position by Amtrak's appearance on the scene. True, Amtrak benefits. But if we know one immutable principle in the law of just compensation, it is that value to the taker is not to be considered; only loss to the owner is to be valued. *United States v. Miller*, 317 U.S. 369, 375 (1943).

(Pet. App. 20a-21a)

Petitioners concede that under the avoidable costing approach ordered by the ICC they will be in the same position monetarily as they would be if Amtrak had not appeared and make no attempt to demonstrate why the above-quoted reasoning and authorities cited by the court of appeals might be inapplicable. Although, as Judge Oakes noted, they have no constitutional right to be placed "in a better position by Amtrak's appearance on the scene," the ICC order about which they complain afforded Petitioners the opportunity annually to earn incentive payments estimated at up to $1.2 million in addition to their $800,000 in out-of-pocket costs. Thus, Petitioners are in the untenable position of complaining about being placed in a better position than they would be entitled to under the law of just compensation.

CONCLUSION

Further review by this Court is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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